Supreme Court, U.S.
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No. 02-132

IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

MOBIL CORPORATION AND
HONEYWELL INTERNATIONAL INC.,

Petitioners,

v.

BRUCE W. ADKINS, *et al.*

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

MEMORANDUM OF DAIMLERCHRYSLER CORPORATION, FORD MOTOR COMPANY, AND GENERAL MOTORS CORPORATION IN SUPPORT OF PETITION FOR CERTIORARI

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August 19, 2002

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, nominal respondents hereby state as follows:

DaimlerChrysler Corporation is wholly owned by DaimlerChrysler North America Holding Corporation, which in turn is wholly owned by DaimlerChrysler AG.

Ford Motor Company has no parent corporation and no publicly held company owns 10% or more of its stock.

General Motors Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

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MEMORANDUM OF DAIMLERCHRYSLER CORPORATION, FORD MOTOR COMPANY, AND GENERAL MOTORS CORPORATION IN SUPPORT OF PETITION FOR CERTIORARI

Nominal respondents DaimlerChrysler Corporation, Ford Motor Company, and General Motors Corporation, which were parties to the proceeding below, now file this memorandum in support of the petition pursuant to this Court's Rule 12.6.

INTRODUCTION

It may seem odd to find that the Nation's three largest automobile manufacturers—DaimlerChrysler Corporation, Ford Motor Company, and General Motors Corporation—are defendants in thousands of asbestos lawsuits recently filed in the courts of virtually every State of the Union. It turns out, however, that for a number of years in the 1960s and 70s, the automakers used brake pads and other friction products containing encapsulated asbestos in their vehicles. Although epidemiological studies have unanimously rejected the notion that exposure to automotive friction products can cause disease, asbestos plaintiffs have nonetheless swept the automakers into their vast net of potential liability along with hundreds of other companies that incorporated products containing asbestos into their own products. Indeed, the standard asbestos complaint now names no fewer than 111 defendants, including the automakers, along with hundreds of additional "John Does." Under any system of justice worthy of the name, plaintiffs cannot remotely attribute their alleged injuries—and the word "injury" is used loosely in a world where most current asbestos plaintiffs manifest "little or no physical impairment," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 631 (1997) (Breyer, J., concurring in part and dissenting in part) (internal quotation omitted)—to any act or omission by the automakers.

This case shows why plaintiffs do not care. The Supreme Court of Appeals of West Virginia has ordered thousands of individual asbestos claims—no one knows how many for sure—to be litigated in a single "trial" against hundreds of defendants *without conducting any inquiry whatsoever into the potential prejudice to any defendant*. In this "mass trial" setting, individual claims and defenses are irrelevant: the jury will simply be asked to use formulas and statistics to allocate liability among the defendants. The more defendants that are sucked into this litigation "black hole," the better from plaintiffs' point of view. As a practical matter, defendants are under hydraulic pressure to settle before participating in any such "trial," especially since the jury will be asked to determine not only defendants' "fault" but also a punitive damages "multiplier" before even considering any issues of causation or compensatory damages.

This Court should not allow this travesty to proceed. The "mass trial" procedure approved by the West Virginia Supreme Court of Appeals bears no resemblance to the traditional judicial model. Just as this Court held in *Amchem* and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), that the asbestos litigation crisis could not be allowed to distort the Federal Rules of Civil Procedure, it is now time to remind state courts that the crisis cannot be allowed to distort constitutional principles of due process either. Accordingly, the automakers respectfully urge this Court to grant the petition and reverse the judgment below.

STATEMENT OF THE CASE

The background of this particular case is discussed at greater length in the petition, and the automakers hereby adopt that discussion. To appreciate the gravity of the constitutional issues presented, it is imperative to appreciate the gravity of the national asbestos crisis. Far from abating in recent years, that crisis has moved to an entirely new level. As the major asbestos manufacturers have gone bankrupt, and as the bankruptcy trusts have begun to dwindle, claims are

increasingly being brought against companies that never manufactured asbestos, but only used asbestos-containing materials in their products or operations. "[A]s one defendant has followed another into chapter 11, plaintiff attorneys have turned to other defendants to substitute for those in bankruptcy (against whom litigation is stayed) and have increased their financial demands on these defendants." Rand Institute, *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 25 (Aug. 2001). Indeed, it is estimated that "[n]ontraditional defendants now account for over 60% of asbestos expenditures," *id.* at 10, and current asbestos litigation has been characterized as "The Search for the Solvent Bystander," Roger Parloff, *The $200 Billion Miscarriage Of Justice,* Fortune, March 4, 2002, at 162.

Thus, although the incidence of asbestos-related disease has declined markedly over the three decades since the government enacted strict regulations governing asbestos use in 1971, *see* National Cancer Institute, *SEER Data*, available at www-seer.ims.nci.nih.gov, there has been a dramatic upsurge of asbestos claims filed in recent years, *see* Rand Institute, *Asbestos Litigation,* at 6, 13; Richard B. Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, Wall St. J., Mar. 5, 2001 ("A generation ago, some experts predicted that asbestos suits would be tailing off by now. But the pace is only picking up.").[1] Many of the plaintiffs filing these new claims have neither "incurred any medical expenses [nor] ever lost a day of work due to asbestos exposure." Parloff, *$200 Billion*

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[1] "It has been 20 to 30 years since most asbestos-containing products were phased out of production completely. As a result, instances of serious asbestosis began declining many years ago. The 1994 edition of the medical text Occupational Lung Disorders describes asbestosis as a 'disappearing disease.' But while asbestosis may be disappearing from America's hospitals, it is precipitously on the rise in America's courthouses, with the rate of new filings against some defendants having nearly tripled in the past two years." Parloff, *$200 Billion Miscarriage,* at 156.

Miscarriage, at 155. The impact on the American economy, however, has been substantial: in the past two years alone, at least ten major companies (Babcock & Wilcox, Pittsburgh Corning, Owens Corning, Burns & Roe, Armstrong World Industries, G-I Holdings, W.R. Grace, USG, U.S. Mineral, and Federal-Mogul Global, Inc.) have been forced to seek bankruptcy protection because of asbestos claims. As *Fortune* magazine recently reported, "[t]otal corporate asbestos liability to U.S. plaintiffs is now expected to reach $200 billion," and "though as recently as 15 years ago dispassionate experts predicted that a total of 100,000 people might eventually file asbestos-related claims, the most recent forecasts predict between 1.3 million and 3.1 million claims, of which only about 570,000 have yet been filed." *Id.* at 155-56.

The automakers, like petitioners Mobil and Honeywell, were never in the business of manufacturing or selling asbestos, but instead are "Main Street" American companies that merely incorporated friction products containing encapsulated asbestos (such as brake pads) into their own products. The automakers purchased such automotive friction products from Federal-Mogul Global, Inc., an automotive-parts supplier that was forced into bankruptcy late last year after being swamped with over 70,000 asbestos friction-product claims.

Based on the Federal-Mogul bankruptcy, the automakers removed thousands of asbestos claims against them from state to federal court under 28 U.S.C. § 1452(b) as "related to" the Federal-Mogul bankruptcy within the meaning of 28 U.S.C. § 1334(b). The purpose of such removal, the automakers explained, was for the federal bankruptcy court for the District of Delaware, where the underlying Federal-Mogul bankruptcy was pending, to conduct a global hearing under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), to determine whether plaintiffs' "evidence" of causation in automotive friction-product cases was admissible, and hence whether plaintiffs' claims could survive summary judgment. Although

the Delaware court provisionally transferred all removed friction-product claims against the automakers to itself under 28 U.S.C. § 157(b), it ultimately concluded that it lacked bankruptcy jurisdiction over those thousands of claims, and the Third Circuit dismissed the automakers' appeal from that order for lack of appellate jurisdiction. *In re Federal-Mogul Global, Inc.*, ___ F.3d ___, 2002 WL 1763923 (3d Cir. July 31, 2002).

The claims removed by the automakers from the West Virginia state courts, however, never even made it into the *Federal-Mogul* proceeding. Almost immediately after removal, and before the Delaware court had entered the provisional transfer order, Chief Judge Haden of the Southern District of West Virginia remanded all the West Virginia claims to state court. *In re Asbestos Litig.*, 271 B.R. 118 (S.D.W.Va. 2001). Accordingly, the claims against the automakers proceeded in the West Virginia state courts, and the automakers joined petitioners' unsuccessful petition for relief in the West Virginia Supreme Court of Appeals. Absent intervention by this Court, the automakers will be part of the "mass trial" in West Virginia state court scheduled to begin on September 23, 2002.

REASON FOR GRANTING THE WRIT

THE WEST VIRGINIA SUPREME COURT OF APPEALS ERRED BY ALLOWING MASS AGGREGATION OF CLAIMS WITHOUT ANY INDIVIDUALIZED INQUIRY INTO PREJUDICE.

The West Virginia Supreme Court of Appeals specifically rejected petitioners' claim that mass aggregation of claims without any individualized inquiry into prejudice violates federal due process. Pet. App. 9a-14a. According to the West Virginia court, such inquiry—known in that State as a *Ranson* inquiry, after *State ex rel. Appalachian Power Co. v. Ranson*, 438 S.E.2d 609 (W. Va. 1993)—is inappropriate in cases (like this one) that have been placed in the new "mass litigation" program "based upon common factual and/or legal issues." Pet. App. 13a; *see also id.* ("[T]he adoption of [the mass

litigation rule] has effectively superceded the requirement that the *Ranson* factors be used in all mass trial cases . . . . Because this Court has previously approved the treatment of the current asbestos cases under the mass litigation rule, there is no reason to reexamine whether these cases should have been grouped together in the first instance.").

The West Virginia court's refusal to authorize any inquiry into prejudice resulting from this unprecedented mass aggregation of thousands of plaintiffs and hundreds of defendants is manifestly incorrect. The only commonality of these claims is that they allegedly involve injury caused by asbestos. The mere existence of a "common factual and/or legal issue" without more, however, is not enough to justify aggregation of claims for trial. To the contrary, it is elementary that due process prevents a joint trial—even in cases involving "common legal and/or factual elements"—where such joinder would be unduly prejudicial to a defendant. This issue often arises in the criminal context, where this Court has emphasized that the Federal Constitution limits judicial discretion to conduct a single trial of multiple defendants. *See, e.g., Bruton v. United States*, 391 U.S. 123, 131 (1968); *Kotteakos v. United States*, 328 U.S. 750, 774-75 (1946). That principle makes sense: it would be fundamentally unfair, for instance, to try someone whose alleged involvement in wrongdoing was only tangential along with the alleged kingpin. *Krulewitch v. United States*, 336 U.S. 440, 454 (1949) (Jackson, J., concurring) ("It is difficult for the individual [defendant] to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together.").

That principle applies with no less force in civil cases. Indeed, that is why Rule 42 of the Federal Rules of Civil Procedure has been construed to allow consolidation of cases in federal court only *after* assessing "'the specific risks of prejudice and possible confusion,'" and weighing those risks against the countervailing burdens of multiple litigation. *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990)

(quoting *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1495 (11th Cir. 1985)). As the Second Circuit has explained, "consolidation should not be ordered if it would prejudice defendant." *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (internal quotation omitted); *see also id.* at 355 (Walker, J., dissenting) ("I agree that trial courts should not employ consolidated trials where they pose substantial risks of prejudice."). Even where consolidation would promote judicial efficiency, as the *Malcolm* court emphasized in reversing a judgment of 48 consolidated asbestos claims, "[t]he benefits of efficiency can never be purchased at the cost of fairness." *Id.* at 350; *see also In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992) ("The systematic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation."); *Johnson*, 899 F.2d at 1285 ("Considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial."); *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983) (*en banc*) ("[A] trial must remain fair to both parties, and . . . considerations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice."); *cf. Richardson v. Marsh*, 481 U.S. 200, 217 (1987) ("On the scales of justice, . . . considerations of fairness normally outweigh administrative concerns.") (Stevens, J., dissenting).

Reasonable jurists can certainly disagree on whether a particular consolidated proceeding will unduly prejudice particular defendants. *Compare Malcolm*, 995 F.2d at 350 *with id.* at 355 (Walker, J., dissenting). But there is *no* room for disagreement on the fundamental principle that unfettered aggregation of claims, without *any* inquiry whatsoever into prejudice, is inconsistent with fundamental fairness.

And the due process issue is presented in this case in about as stark terms as can be imagined, given the outlandish nature

of plaintiffs' claims against the automakers, and the contrast between those claims and the claims against "traditional" asbestos defendants. Every epidemiological study to have examined the issue has rejected the notion that exposure to automotive friction products (even by those persons, like automobile mechanics, exposed on a regular basis), more likely than not causes disease. *See, e.g.*, O. Wong, *Malignant Mesothelioma and Asbestos Exposure Among Auto Mechanics: An Appraisal of Scientific Evidence*, 34 Reg. Toxic & Pharm. 170, 173-74 (2001) (describing studies). That is not surprising, because the encapsulated asbestos in brakes is thermally transformed during the braking process, so that only trace amounts of asbestos are emitted. *See, e.g.*, Wong, *Malignant Mesothelioma*, 34 Reg. Toxic & Pharm. at 174; J. Lynch, *Brake Lining Decomposition Products*, 18 Air Pollution Control Assoc. 824, 824, 826 (1968).[2] Moreover, of the small amounts of asbestos found in brake dust, approximately 80-90% of those fibers are below or far below five microns in length.[3] Fibers of that length are not associated with disease. Indeed, OSHA does not even regulate fiber emissions where the fibers are below five microns because researchers agree that

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[2] *See also* M. Jacko & R. DuCharme, *Brake Emissions: Emissions Measurements From Brake & Clutch Linings from Selected Mobil Sources*, Rept. APTD-1557, at 9-24 (EPA 1973); R. Williams & J. Muhlbaier, *Asbestos Brake Emissions*, 29 Env. Res. 70, 80 (1982); P. Cha & P. Carter, *Simulation of Automobile Brake Wear Dynamics and Estimation of Emissions*, SAE Technical Paper #831036, at 19 (1983); D. Hatch, *Possible Alternatives to Asbestos as a Friction Material*, 13 Ann. Occup. Hyg. 25, 27 (1970); D. Rowson, *The Chrysotile Content of the Wear Debris of Brake Linings*, 47 Wear 315, 315 (1978); W. Parkes, *Occupational Lung Disorders* 235 (2d ed. 1982).

[3] *See, e.g.*, D. Roberts & R. Zumwalde, *Industrial Hygiene Summary Report of Asbestos Exposure Assessment for Brake Mechanics*, Rept. #32.4, at 17 (NIOSH 1982); Sheehy *et al.*, *Control of Asbestos Exposure During Brake Drum Service*, 4 Applied Ind. Hyg. 313, 317 (1989); Hatch, *Possible Alternatives*, 13 Ann. Occup. Hyg. at 28; Johnson *et al.*, *Industrial Hygiene Assessment of Seven Brake Servicing Facilities* 10 (NIOSH 1979); Rowson, *Chrysotile Content*, 47 Wear at 317.

such small fibers are of "very low fibrogenic and carcinogenic potential."[4]

Notwithstanding the unique and novel nature of the friction product claims, the West Virginia Supreme Court of Appeals has now authorized a *single* jury in a *single* trial to determine the "fault" of the automakers alongside hundreds of other defendants with *no inquiry whatsoever* into the resulting prejudice. The West Virginia court's only justification for that ruling is the very one rejected by the federal authorities quoted above: administrative convenience. *See* Pet. App. 12a (asserting that consolidated proceeding "represent[s] the judicial system's best efforts to address the unique challenges of managing this voluminous litigation."). While one may sympathize with the "managerial nightmare of dealing with, or being inundated by, an inestimable and seemingly endless number of asbestos cases," *id.* (internal quotation omitted), that concern provides no excuse for depriving the automakers—and other defendants like petitioners—of their due-process right to a fair trial. Indeed, the West Virginia court's authorization of the mass trial at issue here will only exacerbate, not ameliorate,

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[4] *See, e.g.*, V. Roggli *et al.*, *Analysis of Tissue Mineral Fiber Content*, *in* Pathology of Asbestos-Associated Diseases 299, 333 (1992) (The "low risk of asbestos-related diseases among brake repair workers . . . [is] apparently related to the nature of brake dust. . . . Experimental animal studies have confirmed the very low fibrogenic and carcinogenic potential of short asbestos fibers."); P. Gross & D. Braun, *Toxic and Biomedical Effects of Fibers: Asbestos, Talc, Inorganic Fibers, Man-Made Vitreous Fibers, and Organic Fibers* 44 (1984) ("[T]here is both experimental and epidemiologic evidence as well as the evidence provided by autopsy findings that short asbestos fibers are not pathogenic."); P. Gross, *Is Short-Fibered Asbestos Dust a Biological Hazard?*, 29 Arch. Environ. Health 115, 116 (1974) ("[R]eports from different laboratories are unanimous in finding asbestos that has an average length < 5 microns is devoid of pathogenic potential. This included not only the fibrogenic potential but also the cancerogenic potential."); Parkes, *Lung Disorders*, at 72-74 ("[S]hort fibres (less than about 10 microns) . . . have little or no fibrogenic or oncogenic potential."); *see also* 48 Fed. Reg. 51086, 51111 (Nov. 4, 1983) ("Evidence for risk from fibers less than 5 micrometers in length is inconclusive.").

the "managerial nightmare" that concerned the lower court, as these fundamentally unfair procedures will render West Virginia a national asbestos-litigation magnet.[5]

The bottom line here is that it makes no sense to have a legal regime wherein aggregation of asbestos claims is strictly prohibited in federal court in light of the constitutional concerns underlying the Federal Rules of Civil Procedure, *see, e.g.*, *Ortiz*, 527 U.S. at 845-48, but state courts are wholly unconstrained to aggregate asbestos claims at will. This Court should remind the West Virginia Supreme Court of Appeals, and all other state courts confronted with burgeoning numbers of asbestos claims, that federal due process constrains their ability to strip asbestos defendants of traditional procedural protections in an attempt to address the sheer volume of asbestos claims. Indeed, in light of the ever-burgeoning numbers of such claims now inundating the Nation's courts, it is difficult to conceive of any other issue now confronting the American judicial system that more urgently requires this Court's review.

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[5] These concerns are only exacerbated by the West Virginia Supreme Court of Appeals' refusal to address petitioners' choice-of-law argument, and thereby to allow the trial court to apply West Virginia substantive law to claims that have no connection to that State. *See* Pet. App. 21a-23a (Maynard, J., concurring). The automakers support petitioners' position on the choice-of-law issues raised in the second question presented.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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